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Robert Clarke & Co., Printers, Cincinnati. *November, 1885*

Supreme Court of the United States.

OZARK LAND COMPANY,
No. 1183.] *vs.*
J. W. LEONARD ET AL.

On motion to modify decree below granting appeal and accepting appeal bond.

SUPPLEMENTAL BRIEF.

W. H. CHATFIELD, TRUSTEE,
No. 1182.] *vs.*
J. W. LEONARD ET AL.

On motion to modify decree below granting appeal and accepting appeal bond.

T. W. BROWN,
For Appellant and for Motion.

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On motion to modify decree below granting appeal and accepting appeal bond.

Since the preparation of my brief, certain views have been pressed on my attention, which, in the hurry necessitated by professional engagements elsewhere, were not apprehended, or, if apprehended, were not presented in detail. Besides, the cases of *Kitchen* v. *Randolph*, 93 U. S. 86, and *Sage et al.* v. *Central R. R. Co.*, Id. 419, have been examined.

On page 12 of original brief for motion will be found the answer to the technical objection which the appellees might be expected to interpose to the success of the motion, on the ground that the injunctive part of the decree was *superseded* by the appeal—that objection being, as was anticipated, that the appeal was not *perfected* from *one* of the

decrees complained of within ten days, or within sixty days from the date of its entry, and that therefore appeal did not operate a supersedure as to that decree. That answer was, in substance, that the provisions as to ten and sixty days can not apply to such decrees as are sought to be opened to let in defenses to the merits. It was put on the ground that the necessities of practice required that such decrees for the purposes of an appeal must be considered as *of the date* of the decree refusing motion to open, else such applications, so important to an intelligent administration of law and right, could not be made, because the appeal would remove the cause from the only forum where such application could be made or disposed of. But this was put axiomatically, and is rested on the vigor of the statement without such suggestions in detail as would *illustrate* the soundness of the position. It is rather to *illustrate* than to prove so just and so plain a proposition that this supplemental brief is offered.

The cases quoted *supra* will be relied on by the appellees, as I am informed. It is, however, submitted with great confidence that they do not apply to the state of fact present in the causes now under consideration on this motion, and therefore furnish no rule for application in this instance. In both of the cases cited, one of the justices of this court had by order made the appeal operate a supersedeas, when it had not been perfected within the time. In neither of these had motion been made in the court below, or any proceedings taken, to open, vacate, or modify decree, each and every one of which applications, according to sound rule, universally recognized practice, and the necessities of juctice, *holds up* the decree sought to be

reached by these proceedings until *their termination.* This court held that, on the state of fact in those cases, a justice of this court could not, by *his fiat, extend* the time for a supersedeas beyond that fixed by the statute. Counsel for the motion have not asked any justice of this court to extend the time for a supersedeas. Nor is this court asked to extend the time. But it is insisted that, as to decrees properly depending for any time in the court below on applications to open, vacate, or modify, the statute only applies to such decrees from the date that these applications are disposed of by the court below. To apply it otherwise is to make a statute designed to relieve against a hardship, work an oppression.

If a party against whom a decree has been rendered has the right to apply to the court rendering the decree *within the term* to open, vacate, or modify the same (and this is not and can not be denied), then, if the statute as to appeal and supersedeas is to apply to the decree thus *pending* on the proceedings indicated *before* these latter are disposed of, the party seeking to have the decree opened must have *all these* proceedings disposed of *within the sixty days* from the rendition of the decree, and *that in time to perfect his appeal* besides. This, in nine instances out of ten, would be a *sheer impossibility*, as the observation of every judge or practioner will verify. Thus the application of the statute as to supersedeas claimed by the appellees would operate to deprive a litigant of a most important right, would deny him a relief of the gravest nature, a relief that can only be granted, in by far the greatest number of instances, *in the court below*, and would seriously affect the policy and convenience of this court,

which must deem it above all things expedient that the court below shall correct as many of its own errors and improvidences as possible, and that auxiliary to this the inferior courts and litigants shall not lack for time within which to do this without prejudice to appeals, writs of error, or supersedeas. It has never been held that, on applications for new trial at law, which are often depending *long* after the entry of judgment (indeed, the accepted practice is to enter judgment at once on verdict, though the judge sometimes holds up), the statute as to supersedeas operates against the party seeking appeal or writ of error until *after* the disposal of the motion for new trial. There can be no reason for a different rule in equity.

But a most serious evil which would ensue from such an application of the limitation of the statute as that contended for by the counsel against the motion, would be the opportunity given the judge of the court rendering the decree to defeat *a supersedeas of his decree by delaying action on the application to open, vacate, or modify, until the time for appeal to operate a supersedeas has passed.* It is not against the general experience of the profession that there are judges of inferior courts who have great feeling about their decrees, who are quite nervous about having them reviewed, and with whom, to say the least, there would be a temptation to embarrass an appellant and curtail, as far as possible, the advantages of an appeal. Of course these possible tendencies and evils are to be considered in the construction and application of the limitation insisted on.

To apply to the court rendering a decree to open, va-

cate, or modify, is a right extending *during* the term. This right must exist *without prejudice* to his appeal and benefit of supersedeas. In these causes the applications were made during the term. It is not the intent of the act in regard to supersedeas to force this application to be *made* within sixty days, in order to preserve the right of supersedure, any more than it is the intent of the act to compel the *conclusion* of the application within the sixty days—in order to have appeal with supersedeas. If it should be insisted against the motion that these applications as to a decree below for the purposes indicated should be made within sixty days in order to have a supersedeas with appeal, and the court should incline to attach any importance to the point, it will be found as a matter of fact that the application to open the decree was made within sixty days after the entry of the main decree, which is appealed from.

The two decrees appealed from, nominated in the supersedeas bond accepted by the court are the decrees of "the 7th day of November, 1884," and "the 20th April, 1885." See printed Record, p. 25. On page 19, printed Record, the decree of November 7, 1884, is found. It is true that in the stipulation there is decree shown in the transcript as of October 6, 1884—but it is also admitted that this is recited in the supersedeas bond as of November 7, 1884. In the same stipulation it is agreed that the stipulation is not "to exclude what appears in the printed book on this motion." It does appear in the printed book that a decree was entered up settling the rights of the parties, November 7, 1884. This appears in the supersedeas bond, which specifically describes it as of that date. The decree is printed in the book as of that date.

That the clerk in making up the transcript gives a decree of an earlier date can not affect the verity of the supersedeas bond. The transcripts in these two causes are miserable "botches," and the counsel who signed the stipulation both for and against the motion complained of the work. It is not probable that the counsel and court below would have allowed a misrecital of the decrees appealed from. Indeed, it is so improbable as nearly to reach impossibility. If the court has any doubt as to whether one of the decrees appealed from was of November 7, 1884, and it is deemed a matter of any consequence, it is asked that a *certiorari* be sent to clerk of circuit court rendering the decree, to certify up as to this. The application to open decree and let in answer was made December 27, 1884, in less than sixty days from November 7, 1884.

Finally, however, it is respectfully submitted as a question beyond dispute that, on motion to open a decree and let in answer, until that motion is disposed the original decree sought to be opened is in the breast of the court—is for all practical purposes suspended, and until the motion is *disposed of, can not be appealed from.* It has, during the *pendency* of the motion, ceased to be a *final* decree. The court may possibly see that it be, to a *certain* extent, *not violated.* But he can not *enforce* until the motion is disposed of. Not until then is the decree final and reviewable or appealable. On no other condition is a practicable, safe, and just administration of equity *possible.*

Hence the sixty days in these causes did not commence running until the motions to open and let in answers were denied. This was as late as 20th of April, 1885. Appeal was April 29, 1885, and bond given 5th day of May, 1885.

Therefore this appeal operates as a supersedeas, and supersedes all that can be superseded. The extent of this I have argued in the original brief.

T. W. BROWN,

For Appellant and for Motion.

JAMES H. McKENNEY,
CLERK

Supreme Court of the United States.

OCTOBER TERM, A. D. 1885.

J. W. LEONARD ET AL., APPELLANTS,
vs.
OZARK LAND COMPANY, APPELLEE. } No. 1183.

AND

J. W. LEONARD ET AL., APPELLANTS,
vs.
W. H. CHATFIELD, TRUSTEE, APPELLEE. } No. 1182.

Briefs for Appellees.

MANNING AND WATSON
AND JOHN B. JONES.

WASHINGTON:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1885.

Supreme Court of the United States,

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v.
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and

J. W. LEONARD ET AL., APPELLANTS,
v.
W. H. CHATFIELD, TRUSTEE, APPELLEE.
No. 1182.

On Motion to Modify the Decree.

The printed extracts from the records of the cases in which these motions are made are singularly deficient in dates. These omissions, however, are partially supplied by the stipulations of counsel on pages 31 and 32.

The bills were filed Dec. 14, 1883.

Demurrers filed April 2, 1884.

Demurrers overruled July 14, 1884, and appellants should have filed answers by the August rules. This they failed to do, nor did they answer, but continued in default at both the September and October rules, and at the last-named rules a decree *pro confesso* was taken.

At the November rules, appellants still being in default, a final decree was taken against them, and it was not until December 27 that appellants appeared in Court, and moved

that the decrees aforesaid be set aside, and they be permitted to answer.

This motion was overruled April 20, 1885, whereupon the appellants prayed a general appeal which was granted April 29, 1885.

The supersedeas bond was not tendered and approved until June 2, 1885.

For their dilatoriness throughout no sufficient explanation is given.

It does not appear that either of appellants' counsel was sick or unable to attend the Court during any portion of the period from July, when the demurrer was overruled, until November. when a final decree was entered, and as to one of said counsel, and the appellants themselves, no explanation is even attempted. If circumstances had rendered further time necessary on the part of appellants, this fact, by proper diligence, could certainly have been brought to the notice of the Court before Nov. 7, when the final decree was entered. For the date of this final decree, see printed transcript, page 19, and stipulation of counsel, page 30.

On the state of the case it is with a bad grace that appellants now ask the interposition of this Court.

The error, if any there has been, has manifestly arisen from negligence, and "courts of justice do not sit for the purpose of aiding those who seek redress for supposed mischiefs resulting from such negligence, and courts of equity will not interfere to assist a party to obtain redress for an injury which he might by ordinary diligence have avoided."

Bird *v.* Hoyt, 13 Peters, 263–268.

2. Another pregnant fact in this connection is that Leonard, the real defendant in the case, in his affidavit in support of the motion does not state that he believes his

title to the land in controversy to be good, or that he believes or expects that, if allowed to defend the case on its merits, he will gain it. He does say "that he feels great confidence that the decree of the court below would be reversed by the Supreme Court." (Printed transcript, p. 26.)

But from this reversal it would by no means follow that the appellants would ultimately prevail in the case. Such reversal would only open the way for the hearing of the cause on its merits, and such hearing will not be granted in the absence of evidence at least tending to show that injustice has been done. This Court will not reverse, even for admitted error, when it does not appear that such error worked an injury. The affidavit in the case should have at least averred that affiant had a meritorious defence.

3d. The order of the court below "that the appeal and appeal bond in this cause shall not operate to suspend or affect so much of the decree in this cause as enjoins the defendants from cutting or otherwise trespassing on the lands in controversy in this suit, or removing staves or other timber cut thereon," was one which the court had authority and power to make, and its exercise or non-exercise was a matter of discretion, with which this Court will not interfere.

Wright *v.* Lessees of Hollingworth, 1 Peters, 168.
Dean *v.* Mason, 20 Howard, 198.
Hover *v.* McDonald, 109 U. S., 161.

This Court expressly holds that a motion to allow a party to plead, after default, is addressed to the discretion of the court, and that "when allowed or refused by the court, in the exercise of its discretion, such discretion is not subject to the revision of this court."

Dean *v.* Mason, 20 Howard, 198.

The order complained of, it is submitted, is not an injunction, but an order intended by the court to preserve the *status quo*, until a decision should be made by the Appellate Court.

This order was indispensable to the safety of the appellee. On an affirmance of the decree below by this Court the bond of appellants would give to appellee no protection whatever, unless, perhaps, by an independent separate suit at law. The decree awards no money to the appellee, and, on its affirmance, judgment could only be given in appellee's favor for costs. To this danger or contingency appellee should not be exposed. If either appellants or appellee is to be exposed to danger it certainly should be appellants, since the decree must be held te be right until otherwise determined. The decree is final, leaving open no question as to any recovery of damages, and if affirmed the case would be ended and out of Court.

Micken *v.* Perin, 18 Howard, 510–11.

4th. But even regarding the final decree as original injunction, the appellants should not be at liberty to change the *status quo* of the parties.

Appellant's counsel is in error when he says that it was no part of the final relief specifically prayed for by appellee, "to stop by injunction the cutting of trees and the removing of trees, logs, or timber, or staves." (See his brief, page 3.)

The prayer of the bill, among other things, is specifically for an injunction.

"Commanding, enjoying, and restraining said Leonard from cutting or removing any trees, logs, or timber, or any staves manufactured from trees or timber, from any of the lands in controversy." (See printed transcript, page 11.)

The effect of the supersedeas "is to prevent all further

proceedings in the subordinate court except such as are necessary to preserve the rights of the parties."

Slaughter-house cases, 10 Wallace, 297–8.

In Hovey *v.* McDonald, (109 U. S., p. 161,) the ruling in the "Slaughter-house cases" is approved, and that ruling was, specifically—

"That neither an injunction, nor a decree dissolving an injunction, passed in a circuit court, is reversed or nullified by an appeal or writ of error before the cause is heard in this Court."

Appellee's counsel relies upon what he styles the admission of counsel in the slaughter-house cases. (See his brief, pages 4–5.)

Whatever that admission may have been, the decision of the court was that the effect of the supersedeas "is to prevent all further proceedings in the subordinate court except such as are necessary to preserve the rights of the parties."

All that the court below did, after approving the supersedeas bond, was to make an order which it believed to be indispensable to the preservation of appellee's rights.

Moreover the *status quo*, which the supersedeas is intended to preserve, is not, as opposing counsel contend, "the condition of things which existed just prior to the passing of the final decree in the court below," but that condition of things which is brought about by the final decree. It is the decree which determines and defines the rights of the parties, and it is the office of the supersedeas simply to prevent the execution of the decree. In a word, when a decree has been rendered, and an appeal taken, and a supersedeas bond tendered and accepted, the effect is simply to arrest all further proceedings in the cause by the court below until after the decision of the Appellate Court.

We submit that no part of the return of the court below is "void because *ultra vires*," or irregular and oppressive, as maintained by appellant's counsel. The order of the court restricting the effect of the supersedeas bond is, as we have shown, in strict accordance with the relief prayed for in the bill.

Appellees' counsel is also in error when he states that—

"The court below, in its order on the reception of the appeal bond, forbids the appellants to use the very property which the appellees got the benefit of in exoneration of liability to appellants for the tax liens which he is admitted to have removed."

The averment of the bill on this point is:

"That the amount of staves cut and sold, and the damage to said lands caused by said cutting, greatly exceeds the amount of money required to discharge all tax liens on said lands that have been paid by said Allen and said Leonard." (See printed transcript, p. 13.)

Thus it is seen that appellees' averment is that the staves sold off of said lands by appellants when the bills were filed, had more than reimbursed appellant, for the taxes they had paid on the lands, and, therefore, it was but just that the staves unsold when the final decrees were entered, should be turned over to the appellees on their recovery of the lands.

As an argument, no less than an authority, on the question before the Court as to the propriety of the order of the court below limiting the effect of the supersedeas, (if such limitation were required for the protection of appellees' rights,) the opinion of the court below is respectfully referred to.

MANNING & WATSON,
Atty's for Appellees.

In Supreme Court of the United States.

J. W. LEONARD, J. J. ALLEN, AND JOHN McREA, APPELLANTS,
v.
OZARK LAND COMPANY, APPELLEE; } *No.* 1183.

also

SAME
v.
W. H. CHATFIELD, TRUSTEE. } *No.* 1182.

Brief and Argument of John B. Jones, of Counsel for Appellee.

The merits of appellants' motion can be better understood by a brief reference to a few leading facts shown by the record. The bill was filed to remove clouds from title caused by illegal tax sales, and charged that appellants procured them for the purpose of stripping the lands of timber, and that appellants were trespassing on the lands and cutting the timber. The bill contains all necessary allegations to sustain such a cause.[1]

The allegations of the bill are confessed and cannot be controverted.

Thompson *v.* Wooster, 114 U. S., 104.

NOTE 1. See opinions in this cause; also Lamb *v.* Farrell, 21 Fed. Rep., 5, where the requisites of such a bill under the laws of Arkansas are fully and ably discussed. All opinions and affidavits referred to are printed with this bill, except the opinion overruling the demurrer.

The answer tendered did not deny the allegations of the bill as to illegality of tax sales, and showed no meritorious defense.[1]

The motion to vacate the decree was a matter wholly within the discretion of the court and cannot be reviewed here.

In view, however, of statements of counsel, I may be pardoned for referring to a few of the leading facts as to the merits of that motion. Appellants' demurrer was overruled July 14, and two rule days passed without an answer. Appellants were then notified to answer.[2]

No answer being filed, a decree *pro confesso* was taken October 6th and appellants again notified. No answer still being filed a final decree was rendered Nov. 7.[3]

There was no excuse for failure to answer. More than three months had passed after the demurrer was overruled before the sickness of one of the counsel; besides, there were two counsel engaged in the cause.[4]

The real reason for appellants' failure to answer was given by the court in overruling their motion. The court said: "Their only pretence of title to the land is deraigned through a sale for taxes, which is void, and there is much in the history of the case to justify the suspicion that defendants were not ignorant of the weakness of their title, and that they were merely using it to make a show and pretence of title while they stripped the lands of timber, and that they were not anxious to bring the merits of their title to the test of a judicial examination."

Note 1. See opinions of the Court overruling motion, *Post* 12.

Note 2. See affidavit of John B. Jones, with letter attached, *Post* 17.

Note 3. *Pro confesso* decree, on page 77 of record. Final decree on pages 78 to 87. The statement in stipulation of counsel that both were rendered on same day is a mistake.

Note 4. See extract from affidavit of O. P. Lyles, filed by appellant in support of their motion, *Post* 19.

The bill was filed December 14, 1883. Demurrer filed April 2, 1884, and final decree rendered November 7. Motion made to vacate it December 27, and motion overruled April 20, 1885. There was a continual struggle for delay; in the meantime they continually cut timber until arrested the latter part of January, 1885, for violation of the injunction.

Counsel for appellant argues that the appeal bond ought to suspend the injunction. That an appeal bond or a supersedeas does not have that effect is well settled.

Hovey *v.* McDonald, 109 U. S., 150.

Counsel assumes that so much of the decree as restrains appellants from cutting and removing staves or timber is void.

"Equity has unquestioned jurisdiction, where land is claimed by two parties, to enjoin one from cutting timber, or otherwise intruding upon the land, and for reparation for past intrusion and conversion of timber."

3 Bush, 125.

Upon bills to remove clouds from title, "a court of equity acts *in personam* only, by restraining the defendant from asserting his claim."

Hart *v.* Sansom, 110 U. S., 151.

The cutting and removing of timber is asserting a claim.

Counsel for appellants asks this Court to make some convenient order by which they may be relieved of the "menace and threatened danger" of this injunction. How this is to be done is not suggested.

It is claimed that the staves now on the lands were cut prior to the decree, and that all appellee is entitled to for such staves is the value of the timber. That a tres-

passer is never entitled to the benefit of his labor needs no citation of authority.

The owner of lands may replevy boards cut from his lands.

Davis *v.* Easley *et al.*, 13 Ill., 198.

And may replevy logs cut by parties holding illegal tax deeds.

Austin *v.* Holt *et al.*, 32 Wis., 478.

Washburn *v.* Cutter, 17 Minn., 346.

These staves, however, were not cut prior to the decree, but cut in violation of the decree, during the months of November, December, and January, after the decree, and until McRea was arrested for contempt.[1]

If there could be any difference as to ownership of staves cut before and after the decree, and if a few staves cut before should be upon the lands, still substantially all, at least, were cut afterwards, and appellants by their own showing have wrongfully mixed them. In such case appellants cannot take advantage of their own wrong, and appellee would be entitled to all.

Counsel for appellants is mistaken in his statement that these staves have been paid for by appellants by way of set off for the tax liens.

The staves were cut after the decree, and could not have been so set off. The bill alleges, and the decree finds, that the value of the staves cut and marketed amounts to much more than all the tax liens. Staves cut by a trespasser would not be a proper subject of set-off until converted.

The truth is the amount of tax liens, as compared with the timber cut and sold, is trifling.

Note 1.—See affidavit of the county surveyor, affidavit of C. T. Biser, and opinion of the court overruling motion to vacate decree, *Post* 21-23.

Counsel reviews at some length the case of Hovey *v.* McDonald, *supra*, and other cases, and concludes in effect that none of the cases were appeals from final decrees, but all appeals from preliminary injunctions. Argument is not necessary to show that a preliminary injunction is a mere provisional order, from which no appeal lies.

The suspension or modification of an injunction is a matter within the discretion of the lower court. This was recognized in slaughter-house cases (10 Wall., 273,) and in Hovey *v.* McDonald was said to be the reason of the adoption of the 93d equity rule. At the October term, 1878, of this Court, the time of the adoption of that rule, this Court also adopted a rule of practice applying to cases that had been appealed prior to that time, as follows:

"In cases where appeals of the character mentioned in rule 93 regulating equity practice have already been taken, this Court will, after the cause has been docketed, entertain an application for a suspension or modification of the injunction based upon a statement of the facts affecting the application by a justice or judge who took part in the decision."

As to cases appealed prior to that time, this Court would hear such application only on a statement of facts by a judge who took part in the decision. As to appeals afterwards the inference is this Court will not interfere. By the adoption of these two rules this Court undoubtedly committed the matter of modification or suspension of an injunction entirely to the discretion of the lower court. In this case that discretion has been exercised, and it is respectfully submitted that the action of the Court is not only final, but under the circumstances of this case, was eminently just and proper.

JOHN B. JONES,
Counsel for Appellees.

OPINION OVERRULING MOTION TO VACATE THE DECREE.

OZARK LAND CO.
v.
LEONARD ET AL.

Opinion of Court on motion to set aside decree and permit defendant to answer.

CALDWELL, J.: The object of this suit is to quiet the title of the lands described in the bill.

The bill alleges that the plaintiff is the owner in fee of the lands which are chiefly valuable for the timber upon them; that they are wild and unoccupied; and that the defendants set up a claim to the same land on an alleged tax-title, which is void, and are trespassing upon the same by cutting and carrying away the timber.

The bill was filed Dec. 14, 1883. The defendant, Leonard, was not found in this district, and an order was made on the 5th Feb., 1884, that he be served in Tenn., the State of his residence, with a copy of the order requiring him to appear to the action and plead, answer, or demur, on the first Monday in March, 1884. This order was served on the defendant on the 7th Feb., 1884. The defendants Allen and McRae were served with subpœna on the 8th Feb., 1884.

A demurrer to the bill was filed April 2, 1884, which, after argument, was overruled July 14, '84. The demurrer raised the question which was decided in the case of Lamb *v.* Farrell, 21 Feb., Rep. 5, and in the opinion filed in this case.

It was the duty of the defendants under rule 3d to answer the bill the next succeeding rule day after the demurrer was overruled, which would have been the first Monday

in August. No answer was filed on that day though the defendants had notice that the plaintiff required answer to be filed under the rule. The defendants continuing in default, on the 6th day of October, 1884, a decree *pro confesso* was taken against them. Notice of the decree *pro confesso* was given to defendants' counsel, and no motion to set aside the same or for leave to plead having been made, on the 7th of November, a final decree, upon satisfactory proofs, was rendered.

On the 27th of Dec. following, a motion and affidavits were filed to set aside the decree and permit the defendants to answer, and an answer was then tendered.

At the suggestion of the defendants final action on this motion was continued from time to time, and on the 25th of March, 1885, the defendants tendered for filing, in case the decree was vacated, an amended answer.

The motion to set aside the decree must be overruled for several reasons:

1st. The decree was properly taken after the defendants had been in default for a long time. The default was the result of negligence. The timber on the lands in controversy constitute its chief value. The defendants continued to cut and remove timber from the lands after the decree and before they had ever moved to set it aside. They continued to trespass upon the land until proceeded against for contempt.

Their only pretence of title to the land is assigned through a sale for taxes which is void, and there is much in the history of the case to justify the suspicion that the defendants were not ignorant of the weakness of their title, and that they were merely using it to make a show and pretence of title while they strip the land of its timber, and that they were not anxious to bring the merits of their title to the test of a judicial examination.

2d. There are no merits in the proposed answer. The State acquired the lands from the U. S. under the swamp-land act and if the lands did not pass to the State under that act, they are still the property of the U. S. One of the proposed defenses is that the State procured the title from the U. S. by fraudulently representing that the lands were swamp and overflowed lands when they were not so, and that the lands are still the property of the U. S. It will be time enough to go into an inquiry on that subject when the U. S., or some one claiming by or through the U. S., raises the question. If this defense is true the defendants have no title, for their only pretense of claim is a tax title which confessedly is void if the lands belong to the U. S.

The proofs and exhibits submitted with the bill prove conclusively that the tax sale under which the defendants claim is void. It is void for an excessive levy, and because the requisite notice of delinquency and sale was not given, and for other reasons.

The answer tendered is evasive and unsatisfactory on this point, and fails to show validity or merit in the defendants' title.

The amended answer tendered to be filed sits up same proceedings as had in circuit court of Clay Co., under the overdue tax law, which have not the slightest bearing in this case.

The decree in the overdue tax case chiefly relied on is a nullity. It was rendered on the same day the bill was filed without the notice prescribed by statute, and without any notice to any one. The plaintiff was not a party, had no notice, and did not appear to the action, and for these reasons would not be bound by the decree if it was otherwise regular. The other decree exhibited adjudges the tax sale invalid.

If the tax sales are void, the defendants have no title, and it is not perceived how their case is strengthened by a judgment to that effect. If that decree could have any bearing in the case, it would itself be fatal to the defendant's claim.

3d. The answers tendered set up defenses inconsistent with each other, viz:

1st. That defendants acquired title through a sale of lands for taxes; and,

2d. That the lands are, and always have been, property of the U. S. If they were the property of the U. S., they were not subject to taxation.

A defendant cannot insist upon two defenses which are inconsistent with each other on the consequence of inconsistent facts.

From the case of Jasus College *v.* Gibbs and Leech B. Bailey, above referred to, it is to be collected that, when a defendant sets up by his answer two inconsistent defenses, the result will be to deprive him of the benefits of either, and to entitle the plaintiff to a decree. (1 Daniels, ch. Fl. and Pr. 713.) There may be some doubt whether this rule should now obtain in all its strictures where the answer is not under oath. In the practice in the courts of this State, under the code, it does not prevail, but the answer, and amended answer, in the case at law are under oath; they are tendered as showing merits, and is a basis for setting aside a final decree, duly rendered on an *exparte* hearing on a bill previously taken, as confessed for want of an answer.

The showing made in such cases should be free from deceit and double dealings, and when the answer sets up two defenses, one of which must undoubtedly be false, the defendant discredits himself by his own pleadings, and the answer should avail him nothing.

Pages of Record, 352–361.

OPINION OF COURT REFUSING TO SUSPEND INJUNCTION.

OZARK LAND CO.
v.
LEONARD et al.

Opinion of Court on effect of Supersedeas Bond.

CALDWELL, J.: The defendants, by O. P Lyles, their solicitor, tendered an appeal bond in this case, and stated that the penalty of the bond was sufficient to cover the value of the timber on the lands in controversy, and prayed the opinion of the Court as to whether the defendants, upon the approval of the bond, would have a right to cut and remove the timber from the lands in controversy, notwithstanding the injunction contained in the final decree perpetually enjoined them from so doing. The injunction is not nullified by the appeal. The Supreme Court says neither an injunction, nor a decree dissolving an injunction, passed in a circuit court, is reversed or nullified by an appeal or writ of error before the cause is heard in this Court. (Slaughter-house cases, 10 Wall., 273.) This doctrine is reaffirmed in Harvey *v.* McDonald, 109 U. S., 150, where the Court say "It is decided that neither a decree nor an injunction, nor a decree dissolving an injunction, was suspended in its effects by the writ of error, though all the requisites for a supersedeas were complied with."

In the last case cited it is said the power undoubtedly exists in the circuit court, if the purposes of justice require it, to order a continuance of the *status quo* until a decision by the appellate court, and that equity rule 93 was adopted in recognition of this power. If no order was made by the court on the subject, the injunction would remain in force against the defendants, notwithstanding the

appeal. But, to prevent any misconception on the subject, the order approving the bond will state that the appeal is not to suspend the injunction.

This is proper because for the court to permit the appeal to supersede the injunction, and the defendants to go forward and cut the timber on the land in controversy, would be to take from the plaintiffs the fruits of their decree. The land is only valuable for its timber. If the defendants are allowed to cut and remove the timber, and the decree should be affirmed, the plaintiff, while nominally successful, would in reality lose the subject matter of the litigation, which would go to the defendants.

It is said that in case the decree is affirmed the defendants and his sureties would be liable on the supersedeas bond to the plaintiff for the value of the timber cut. Conceding, but not deciding, that this would be so, then the result of a suspension of the injunction on the defendants would be in effect a sale by the court of the timber on the land to the defendants without the consent of the plaintiff. This is a case where the *status quo* should continue until the case is decided by the appellate court, and an order will be entered to that effect. This will preserve the rights of both parties.

Rec., pp. 361–364.

AFFIDAVIT OF JOHN B. JONES.

OZARK LAND COMPANY
v.
J. W. LEONARD, JOHN MCREA and J. J. ALLEN.

John B. Jones, being duly sworn, on oath says that he was solicitor for complainants in the above cause; that

after the demurrer was overruled in the cause, about the 14th of July, 1884, affiant met O. P. Lyles and T. W. Brown, solicitors for defendants, at the city of Little Rock, and told them he desired them to answer as soon as possible; that they intimated that they would take the papers in the cause with them to Memphis and prepare an answer at once; that affiant expected an answer to be filed by 1st Monday in August; that there being no answer by the 1st Monday in September, 1884, affiant applied to the deputy clerk of said court and requested him to write to T. W. Brown for the papers filed in the cause; that said Brown told this affiant since the decree was rendered in this cause that he received such a letter from the deputy clerk.

Affiant further states that in the early part of the month of September, 1884, he wrote the said O. P. Lyles a letter that an answer must be filed at once or a final decree would be taken.

Affiant says that two rule days had then passed after the demurrer was overruled; that, no answer having been filed on the 1st Monday of October, 1884, affiant took a decree *pro confesso*, and afterwards wrote said Lyles the letter hereto attached marked Exhibit "A," which letter was received by said Lyles and returned to affiant when defendants moved to set aside said decree.

That T. W. Brown, one of the counsel for the defendants, took with him to Memphis, after the decision of said demurrer, all the papers in said cause; that in the early part of September, 1884, affiant requested the deputy clerk of this Court to write for said papers; that affiant heard said Brown say he had received such a letter from the deputy clerk and did not answer the same.

JOHN B. JONES.

Sworn and subscribed to before me this 21st day of Jan'y, 1885.

[L. S.] JOHN STODDARD,
Notary Public.

EXHIBIT (A)

LITTLE ROCK, ARK., *Oct.* 24, 1884.

DEAR LYLES: I wrote you more than a month ago that I would take a final decree in the Leonard case unless the answer was filed by the last rule day. It was not filed. The Ozark Company are very much out of patience with me about the delay in trial of the case. I only took a *pro confesso* decree, which, of course, will be set aside if you answer, but, unless the answer is filed, I will be compelled to take a final decree. I dislike very much to do so. I never approved of *snap* judgments in trials of suits, but I see no other course.

The answer should have been filed three months ago. Please have it filed at once. I have not been to the clerk's office since the last rule day, and it may be filed now, if it is I take it all back. I write because it is easier than to go to see about it.

Your friend,

JOHN B. JONES.

Page of Record 106 to 108.

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Extract from affidavits of O. P. Lyles, filed by appellants in support of motion to vacate decree.

During the latter part of August and first of September, 1884, I was frequently absent from Memphis profession-

ally preparing causes for the fall courts. During the latter days of September and up till the 3d day of October, 1884, I was engaged professionally in the counties of Craighead and Poinsett. On the 3d of October, 1884, I reached my home in Memphis sick, and from that time up to 18th of December I was very sick, except about one week preceding the 18th of December. In these cases it was understood that I did the corresponding. A short time before I was confined to my room I received a letter from John B. Jones, counsel for complainants, in which he called on me to see Judge Brown and take action in the case. I do not remember the date of this letter. I thought I mailed it to Judge Brown but am by no means certain. I have a faint, dim memory that soon after I received this letter I casually met Judge Brown on the streets of Memphis and spoke to him about it.

Rec., pp. 78–87.

MOTION FOR ATTACHMENT.

* * * * *

And on January 22, 1885, as follows:

OZARK LAND CO.
v.
J. W. LEONARD, J. J. ALLEN, and JOHN MCREA.

On this day comes the complainant, by John B. Jones, Esq., its solicitor, and presents to the court affidavits of E. M. Allen and C. T. Biser, and moves the court for an attachment against the defendants, J. W. Leonard and John McRea, for violation of the injunction in this cause, and the court, on consideration thereof, orders that an at-

tachment issue against said defendants, J. W. Leonard and John McRea, and that they show cause why they should not be punished for contempt of court in violating the said injunction.

AFFIDAVIT OF COUNTY SURVEYOR.

Which affidavit of Allen is as follows:

STATE OF ARKANSAS, }
County of Clay. }

E. M. Allen, being duly sworn, states that he is county surveyor of Clay county, Arkansas; that he has in last few days visited and examined the following lands in the eastern district of Clay county, to wit:

The N. ½ of section 15, the S.E. S.E. section 10, the N. W. ¼ of sec. 14, the E. ½, E. ½ of sec. 14, and the W. ½ sec. 11, all in Township 19, R. 8 East. That upon said lands there is now located two or more camps of stave cutters. That on said land in sec. 11 he saw men cutting stave timber on the 9th day of January, 1885, and notified them that it was land claimed by the Ozark Land Company, and that they stated they were working under John McRea as agent of J. W. Leonard, and had no other interest in the matter. That they had heard Leonard was beaten, and had no orders to stop cutting. That on all of said land mentioned there has been a good deal of oak stave timber cut lately, within the last two months, and there is at present a large lot of said staves still on said land.

That he is well acquainted with the following lands: (Here follows a description of lands as in bill.) That nearly, if not all, of said lands are wild and uncultivated, and are not worth one dollar and a half per acre; a large

portion of the best timber has been cut for staves, and much of it destroyed unnecessarily. That only choice trees have been cut, and only choice cuts used from the trees cut down.

That no person lives upon, or is in possession of, said lands, and that the timber cutting done on said lands has been for the purpose of making staves, or otherwise converting the timber to use, and not for the purpose of clearing or preparing said lands for cultivation or agricultural purposes.

That within the last two months affiant has had a conversation with John McRea, in which he informed said McRea that decree had been rendered against Leonard. That he does not remember the exact words that McRea used in reply, but it was to the effect that he would quit when stopped by the officers.

Record pages 96 to 99.

IN THE SUPREME COURT OF THE UNITED STATES.

J. W. LEONARD et al., Appellants,
v.
OZARK LAND COMPANY, Appellee.

Charles T. Biser, being duly sworn, on oath says he is president of the Ozark Land Company, the above-named appellee. Affiant further says that the staves, now upon the lands in controversy, cut by the appellants were substantially all cut by them since the rendition of the decree. That appellants, after the decree was rendered, continued to cut timber from the lands, in violation of the injunction, until arrested for contempt for violation of the decree. That the staves so cut in violation of the decree

are mainly all the staves appellants now seek to obtain by the motion in this cause.

CHARLES T. BISER.

Subscribed and sworn to before me at office in St. Louis, this 5th day of November, 1885.

[SEAL.] WM. MORGAN,
Commissioner U. S. Circuit Court, Eastern District of Missouri.